Supreme Court, U.S.
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No. 14-857

In the Supreme Court of the United States

CAMPBELL-EWALD COMPANY,
Petitioner,

v.

JOSE GOMEZ,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The circuits are undeniably divided on the important jurisdictional question of whether, or when, a case no longer presents an actual case or controversy under Article III because the plaintiff received an offer of complete relief. Pet. 13-18. This Court granted certiorari to resolve that question in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013), but was unable to do so because of a procedural flaw that came to light after it granted certiorari. *Id.* at 1529. This case presents a clean opportunity to decide the issue left open in *Genesis Healthcare*, as well as the related—and equally important—question of when an offer of complete relief moots a class claim. *See* Amicus Br. for Chamber of Commerce of U.S. *et al.* (Chamber Br.). Respondent does not seriously dispute any of that. Instead, his central submission is that there is no need for this Court to decide this issue because the *dissent* addressed it in *Genesis Healthcare*. Opp. 2-3, 7-15. That contention should be rejected.

First, the dissent obviously did not—and could not—resolve the circuit conflict. Second, what the Court did say in *Genesis Healthcare*—along with the Court's other "case and controversy" decisions—directly undercuts the dissent. *See infra* at 5-7. And third, whether a majority of the Court agrees with the dissent or not, the Court should grant certiorari and decide the issue for itself. If the Court agrees with the dissent, it should say so and finally eliminate the conflict and confusion on this important and recurring jurisdictional issue. And if the Court does not, then that is all the more reason to grant review now, instead of standing by while lower courts, like the Ninth Circuit, disregard fundamental Article III limits.

Indeed, one of the great costs of failing to respect Article III's case-and-controversy requirement is that it leads courts unnecessarily to "expound[]" on the law. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006). Here, the Ninth Circuit expounded an extraordinarily limited conception of the important derivative-sovereign immunity rule of *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940). The response just confirms that the Ninth Circuit has severely limited *Yearsley* and underscores that this issue warrants this Court's review as well.

ARGUMENT

I. THE JURISDICTIONAL QUESTIONS WARRANT REVIEW

A. The Circuits Are Indisputably Split

Respondent perplexingly argues that this Court did not determine that the jurisdictional issue warranted certiorari in *Genesis Healthcare*. Opp. 8. Wrong.

In *Genesis Healthcare*, the Court granted certiorari to decide the question "[w]hether a case becomes moot, and thus beyond the judicial power of Article III, when the lone plaintiff receives an offer from the defendants to satisfy all of the plaintiff's claims." Pet. i (11-1059). The Court began its decision by addressing "whether an unaccepted offer that fully satisfies a plaintiff's claim is sufficient to render the claim moot," noting that the circuits are "split" on this issue and that the lower courts below had concluded that petitioners' offer of complete relief "mooted" the plaintiff's claim. 133 S. Ct. at 1528-29. But the Court determined that it could not "reach this question, or resolve the split," because of a procedural issue not present here. *Id.*

That the Court was unable to *reach* "the question

whether an offer of judgment moots an individual claim" hardly means, as respondent posits, that the Court determined that this issue did not "*warrant[]* review." Opp. 8 (emphasis added). This Court necessarily determined that this issue warranted review when it granted certiorari to decide it. Precisely because this Court was unable to resolve this issue in *Genesis Healthcare*, the circuit conflict recognized in *Genesis Healthcare* still exists. That conflict not only is as certworthy today as it was at the time of *Genesis Healthcare*, but it is *more* certworthy in light of the added confusion that has ensued in the wake of *Genesis Healthcare*. Pet. 17-18.

Ultimately, respondent's contention is that this conflict no long matters because the dissent in *Genesis Healthcare* correctly answered the question. Opp. 8-14. But that argument just begs the question *the Court* should grant certiorari to decide—and incorrectly assumes the dissent was right. *Infra* at 5-7. Moreover, respondent's proposed solution of waiting some untold number of *additional* years to see what happens is impractical. The threshold jurisdictional issue presented is recurring frequently. But not a single circuit has flipped its position on this issue in the two years since *Genesis Healthcare*—belying the notion that this conflict will just fade away. The only thing that has changed is that the *Genesis Healthcare* dissent has hardened the position of the courts on the "no mootness" side of the conflict, while putting other courts in a difficult position with its blunt admonition, "Don't try this at home." 133 S. Ct. at 1534.

Respondent is also wrong that *Genesis Healthcare* obviates the need to resolve the related question of whether, or when, an offer of complete relief moots a

class claim. Recognizing that *Genesis Healthcare* undermines the reasoning courts had followed in extending the relation-back doctrine to this context, courts have tried to justify their decisions by relying on differences between FLSA collective actions and Rule 23 class actions. *See* Pet. App. 6a; *Stein v. Buccaneers Ltd. P'ship*, 772 F.3d 698, 708 (11th Cir. 2014); Opp. 16-18. But as petitioner has explained, before a district court rules on class certification, a plaintiff bringing representative claims under Rule 23 occupies the same position as a plaintiff bringing representative claims under the FLSA. Pet. 20. Just as in *Genesis Healthcare*, that putative class representative has no "personal stake" in representing unnamed class members that would "preserve [the] suit from mootness." 133 S. Ct. at 1530. The lower courts' reliance on this faulty distinction is further reason to grant certiorari now and prevent further misapplication of *Genesis Healthcare*.

There is no reason to wait any longer to resolve the conflict. The jurisdictional issues were adequately fleshed out when the Court granted certiorari in *Genesis Healthcare* and are only more developed now. The issue is recurring, especially as the wave of TCPA class actions grows. *Infra* at 9. The viability of such actions after a defendant has made an offer of complete relief should not depend on whether they are filed in one circuit, or another. That is true for defendants in circuits, like the Ninth, that hold that an offer of complete relief does not moot a claim, just as it is for plaintiffs in circuits, like the Seventh, that hold that an offer of complete relief *does* moot a claim. Pet. 14-15.

The real-world impact of this conflict is undeniable. In the wake of *Stein*, for example, the Eleventh Circuit

already has thrice reversed orders dismissing TCPA class actions as moot because defendants made offers of full relief. *Walker v. Financial Recovery Servs., Inc.*, No. 14-13769, 2015 WL 1383233 (11th Cir. Mar. 27, 2015); *Barr v. Harvard Drug Grp., LLC*, 591 F. App'x 928 (11th Cir. 2015), *petition for cert. filed*, No. 14-1194 (Jan. 29, 2015); *Keim v. ADF Midatlantic, LCC*, 586 F. App'x 573 (11th Cir. 2014). Meantime, lower courts continue to acknowledge the circuit conflict and the need for guidance from this Court. *Swanigan v. City of Chicago*, 775 F.3d 953, 960 n.3 (7th Cir. 2015); *Suttles v. Specialty Graphics, Inc.*, No. A-14-CA-505 RP, 2015 WL 590241, at *3 & n.2 (W.D. Tex. Feb. 11, 2015). And courts have recognized that, because this Court did not decide the jurisdictional issue in *Genesis Healthcare*, pre-*Genesis Healthcare* circuit law remains binding. *Suttles*, 2015 WL 590241, at *3; *Sebestyen v. Leiken, Ingber & Winters, P.C.*, No. 13-cv-15182, 2015 WL 1439881, at *7 (E.D. Mich. Mar. 27, 2015).

In short, review is needed now.

B. The *Genesis Healthcare* Dissent is Not "Unrebutted"

A central premise of the response is that the *Genesis Healthcare* dissent is "unrebutted" (Opp. 7)—and *unrebuttable* (*id.* at 14-15). Of course, that goes to the merits of the jurisdictional issues—a question for plenary review. In any event, respondent is wrong.

As *the Court* reiterated in *Genesis Healthcare*, Article III "restricts the authority of federal courts to resolving '"the legal rights of litigants in actual controversies."'" *Genesis Healthcare*, 133 S. Ct. at 1528 (quoting *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982) (internal citation

omitted)). Such a controversy must exist at "*all* stages of federal judicial proceedings." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990) (emphasis added). "Article III denies federal courts the power 'to decide questions that cannot affect the rights of litigants in the case before them.'" *Id.* (citation omitted).

When a defendant offers a plaintiff complete relief on his claim, the plaintiff no longer has a "'personal stake'" sufficient to confer jurisdiction under Article III, *Camreta v. Greene*, 131 S. Ct. 2020, 2028 (2011) (citation omitted), and there is no longer a "'real and substantial controvers[y]'" triggering the jurisdiction of the courts, *Lewis*, 494 U.S. at 477 (alteration in original) (citation omitted). When a defendant has agreed to give the plaintiff all that he seeks—and to have judgment entered against it—a case cannot have "direct consequences on the parties involved." *Genesis Healthcare*, 133 S. Ct. at 1528. There is no longer any injury that can "be 'redressed by a favorable decision,'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (citation omitted), and the case must be dismissed as beyond the province of the federal courts.

The central premise of the dissent in *Genesis Healthcare* is that a case cannot become moot unless the plaintiff has actually *accepted* such an offer. But the Court in *Genesis Healthcare* cast doubt on, if not rejected, that very premise. As the Court explained, "Courts of Appeals on both sides of [this jurisdictional] issue have recognized that a plaintiff's claim may be satisfied even *without* the plaintiff's consent." 133 S. Ct. at 1529 n.4 (emphasis added). In other words, Article III does not grant a plaintiff an exclusive on-off switch for Article III jurisdiction by deciding whether to accept, or deny, an offer of complete relief. When

the plaintiff has been offered complete relief, it is not the prerogative of the federal courts to plunge ahead—and expound on the law—simply for sport.

To get to this result, some courts have held that "an unaccepted offer of complete relief alone is sufficient to moot the individual's claim." *Genesis Healthcare*, 133 S. Ct. at 1529 n.4. Other courts have held that, "in the face of an unaccepted offer of complete relief, district courts may 'enter judgment in favor of the plaintiffs in accordance with the defendants' Rule 68 offer of judgment,'" which would also moot the plaintiff's case. *Id.* (quoting *O'Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567, 575 (6th Cir. 2009)); *see McCauley v. Trans Union, L.L.C.*, 402 F.3d 340, 342 (2d Cir. 2005). In *Genesis Healthcare*, the United States recognized the "legitimate impulse" that a court should not "expend judicial and litigation resources resolving the merits of a claim that the defendant informs the court it will fully satisfy," and argued that the latter approach was the "'better'" way to address that impulse. U.S. Br. 13-14 (11-1059) (citation omitted). And even the respondent there agreed that "it is possible for a court to enter a default judgment and *force* relief upon the plaintiff." Arg. Tr. 30 (11-1059) (emphasis added). But either approach answers the *Genesis Healthcare* dissent.

The questions presented readily encompass both of these approaches, just as the jurisdictional question did in *Genesis Healthcare*. And the petition discusses (at 14-17), and advances (at 17), both approaches as ways of answering the jurisdictional questions presented.

C. The Alleged Vehicle Issues Are Illusory

As a last-ditch measure, respondent renews the same vehicle arguments he unsuccessfully advanced below. Opp. 23-24. Both courts below rejected the

same arguments and squarely reached and resolved the jurisdictional issues. The arguments still lack merit.

First, respondent claims that "Campbell-Ewald's offer was not genuinely an offer of full relief." Opp. 23. But he ignores the terms of the offers (Pet. App. 52a-61a), not to mention the district court's finding that "[t]he parties do not dispute that Defendant's Rule 68 Offer would have fully satisfied the individual claims asserted, or that could have been asserted, by Plaintiff in this action," *id.* at 40a. The offers would have more than trebled the damages for any violation, and attorney's fees are not authorized under the TCPA. Pet. CA9 Reply 6-7, ECF No. 16-1 (9th Cir. Aug. 9, 2013). Moreover, the Ninth Circuit likewise decided this case on the premise that the offers *do* "'fully satisfy'" respondent's claim. Pet. App. 5a.

Second, respondent says that the district court "ordered Campbell-Ewald's Rule 68 offer stricken." Opp. 24. That is a red herring. The district court simply struck the written "*notice* of offer of judgment" filed with the district court with the Rule 68 offer—not the offer itself. Pet. App. 38a (emphasis added), 49a. The court granted the motion to strike because, by the terms of the Rule 68 offer, written *notice* is not required unless the plaintiff accepts the offer. *Id.* at 49a. The district court did not, and could not, eliminate the offer itself; both the Rule 68 and separate settlement offer are in the record below and before this Court (*id.* at 52a-61a); and courts routinely look to the offer of judgment—whether or not accepted or even stricken—to determine whether a case is moot.

Third, respondent points to the fact that the parties agreed to a schedule for a class certification motion. Opp. 24. That has no bearing on whether petitioner's

offer of complete relief mooted respondent's *individual* claim. And the Ninth Circuit properly excluded this from the analysis of whether the offer of complete relief mooted the *class* claim. As petitioner has explained, what matters is not the schedule for filing a class certification motion, but whether the offer of complete relief is made before, or after, any class is actually *certified* by the court. Pet. 18-21.

D. The Issues Are Undeniably Important

Respondent does not seriously try to dispute the importance of the jurisdictional issues. The issues concern a matter of threshold importance governing the authority of the courts. Moreover, as the amici Chamber of Commerce and Business Roundtable have explained, the types of "headless" class actions at issue "encourage[] lawsuits and discourage[] settlements," harming the judicial system and undermining the federal policy of promoting settlement. Chamber Br. 3, 13-17. TCPA class actions, in particular, are now sweeping the federal courts. Pet. 27-28 & n.6. Allowing plaintiffs to press forward with such class actions after a defendant has offered them complete relief subverts the ordinary incentives and is a recipe for class action abuse. Chamber Br. 15-17.

II. THE IMMUNITY QUESTION WARRANTS REVIEW

On the derivative-immunity question, respondent just doubles down on the Ninth Circuit's remarkable position on *Yearsley*. *See* Pet. 23-27. He does not dispute that the Ninth Circuit has categorically confined *Yearsley's* derivative-immunity rule to cases involving "federal public works" and "property damage." Opp. 26. And he goes even further than the

Ninth Circuit by arguing that *Yearsley* "in no sense involved 'derivative sovereign immunity,'" and, indeed, does not "concern[] 'immunity'" at all. *Id.*

That extreme reading of *Yearsley* conflicts with the vast majority of courts that, like this Court and the Solicitor General, have recognized that *Yearsley* establishes a general derivative-immunity rule. *See* Pet. 26-27; *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575, 583 (1943); *KBR v. Metzgar*, U.S. Br. 4-5, 18-19 (13-1241) (recognizing that *Yearsley* establishes a principle of "derivative sovereign immunity"); *see also KBR v. Metzgar*, Amicus Br. for the Associated Gen. Contractors of Am. *et al.* 7-10 (13-1241) (discussing importance and widespread application of *Yearsley*'s "doctrine of derivative sovereign immunity").*

Respondent's claim that *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), sheds no light on this issue, or even "supercede[s]" *Yearsley*, is likewise incorrect. Opp. 26-27, 29. Although the result

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* *See also, e.g., Metzgar v. KBR, Inc. (In re KBR, Inc.)*, 744 F.3d 326, 342 (4th Cir. 2014) ("The concept of derivative sovereign immunity stems from [*Yearsley*] . . . ."), *cert. denied*, 135 S. Ct. 1153 (2015); *Ackerson v. Bean Dredging LLC*, 589 F.3d 196, 204 (5th Cir. 2009) ("Contractor Defendants are entitled to government-contractor immunity under *Yearsley*."); *McCue v. City of N.Y. (In re World Trade Ctr. Disaster Site Litig.)*, 521 F.3d 169, 196 (2d Cir. 2008) ("Derivative immunity was first extended to private contractors in *Yearsley* . . . ."); *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1343 (11th Cir. 2007) ("The doctrine of derivative sovereign immunity had its origin in *Yearsley* . . . ."); *Butters v. Vance Int'l, Inc.*, 225 F.3d 462, 466 (4th Cir. 2000) (discussing *Yearsley* and "well-settled law that contractors and common law agents acting within the scope of their employment for the United States have derivative sovereign immunity"); *Carley v. Wheeled Coach*, 991 F.2d 1117, 1120 (3d Cir.) (recognizing *Yearsley*), *cert. denied*, 510 U.S. 868 (1993).

in *Boyle* is ultimately grounded in preemption rather than immunity principles, the Court's decision belies the Ninth Circuit's limiting reading of *Yearsley*, not to mention respondent's remarkable position (*id.* at 26) that *Yearsley* does not concern immunity at all. *See* Pet. 25-26; *KBR, Inc. v. Metzgar*, U.S. Br. 19 (explaining that "*Boyle* relied on this Court's discussion of derivative sovereign immunity in *Yearsley*").

Certiorari is thus also warranted to review the Ninth Circuit's ruling that derivative immunity is categorically inapplicable to government contractors, like petitioner, engaged in more modern activities like helping the Nation's military harness 21st century communications technology for recruiting.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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